

No. 17362

FILED

IN THE

JAN 8 1962

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT FRANK H. SCHMID, CLERK

FAYE LYONS,

Appellant,

vs

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLILAND,

Appellee.

Appeal from the United States District Court for the
Southern District of California,
Central Division

APPELLANT'S OPENING BRIEF

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38	Cal. Civ. Code § 47

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAYE LYONS,

Appellant,

vs

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLILAND,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT CONCERNING PLEADINGS,
FACTS AND JURISDICTION

In re: Jurisdiction

This appeal is from a judgment on a retrial of the issues set forth in the second cause of action of plaintiff's Amended Complaint [Tr. p. 6-7] for libel.

"Plaintiff was, at the time of filing the amended complaint herein, a citizen of the State of Florida and the defendant was a citizen of the State of California and the matter in controversy exceeding the sum of \$3,000 exclusive of interest..."

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAYE JONES,

Appellant,

vs

ELISABETH C. MACKEY CHILLAND, also
known as ELISABETH MACKEY CHILLAND,

Appellee.

APPELLANT'S WRITING SALES

STATEMENT CONCERNING VERDICT,
FACTS AND JURISDICTION

In re: Jurisdiction

This appeal is from a judgment of a Federal

of the lands set forth in the second clause of

section of Plaintiff's amended Complaint (p. 4, 5-6)

V) for libel.

'Treason' was, at the time of filing the

amended complaint herein, a citizen of the State

of Florida and the defendant was a citizen of the

State of California and the matter is controverted

concerning the sum of \$1,000 exclusive of interest.

[Pre-Trial Statement, Exhibit 1 - Rep.Tr. p. 7.]

Where there is diversity of citizenship the District Court has jurisdiction of the case providing the amount in controversy exceeds \$3,000.

28 USCA 1332

The courts of appeal have jurisdiction from all final decisions of the district courts of the United States.

28 USCA 1291

Statement of the Pleadings

The second cause of action of the Amended Complaint is the only cause of action involved herein. Plaintiff alleged: That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his

(Pre-Trial Statement, Exhibit 1 - Page 10, p. 10)
There there is obviously no relationship the
District Court has jurisdiction of the case pre-
viding the amount in controversy exceeds \$3,000.

18 USC 1332

The course of appeal have jurisdiction from
all final decisions of the district courts of the
United States.

18 USC 1331

Statement of the Plaintiff

The second cause of action of the amended
Complaint is the only cause of action involved
herein. Plaintiff alleges that on or about the
15th day of November, 1952, at Los Angeles, California
County of Los Angeles, State of California, and
the defendant Elizabeth C. Roberts Gilliland, also
known as Elizabeth Roberts Gilliland, well knowing
the premises, in a certain manuscript in the possession
and hearing of diverse persons, maliciously
spoke, wrote and verified and published of and
concerning the plaintiff the false and malicious
words following, to wit: "That, in May and June,
1952, Ray Gilliland was arrested with, Isaac, and his
comet adversary with one Ray Lyons, at his

residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That plaintiff herein was never served in said divorce proceeding nor did defendant endeavor to serve said plaintiff nor was plaintiff given an opportunity to defend her good name in the matter nor assuage her feelings by being given the opportunity to defend as required by the Statutes of the State of California. [Tr. p. 6-7]

Defendant admitted the publication of the libel but set up the two defenses of "truth" and "privilege". [Rep.Tr. p. 11, 12, 15, 16, 20]

The jury found that the alleged libel was untrue but that its publication was privileged. [Tr. p. 21]

The judgment for defendant for costs followed. [Tr. p. 22, 23]

Statement of the Case

The words used were libelous per se and the

residence at 4111 North First Street, Glendale, California, Arizona; and that, on the night of September 28, 1935, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Ray Lyons at the Colonial Hotel, Las Vegas, Nevada, where Ray Gilliland and said Ray Lyons were registered by him as "Ray Gilliland and Family."

That plaintiff herein was never served in said divorce proceedings nor did defendant endeavor to serve said plaintiff nor was plaintiff given an opportunity to defend her good name in the matter nor was she ever furnished by being given the opportunity to defend as required by the statutes of the State of California. (Ex. 1, p. 6-7)

Defendant admitted the publication of the libel but not of the two defenses of "truth" and "privilege". (Ex. 1, p. 11, 12, 13, 14, 15, 16, 17) The jury found that the alleged libel was untrue but that the publication was privileged.

(Ex. 1, p. 11)

The judgment for defendant for costs follows.

(Ex. 1, p. 12, 13)

Statement of the Court

The words used were libelous per se and the

publication was admitted. The jury found that they were false.

The jury also found that their publication was privileged.

On the question of privilege, only information which had been communicated to defendant at the time of the publication is relevant.

It is appellant's contention that such evidence in this case is insufficient to support the verdict of privilege and the judgment based thereon.

SPECIFICATIONS OF ERROR

Appellant specifies the following errors in the record and proceedings in this case:

I

The evidence is not sufficient to support the verdict that the published libel was privileged.

II

The evidence was not sufficient to support the "Judgment on Verdict" herein.

ARGUMENT

Since the words involved are libelous per se, since their publication is admitted and since

was not shown that the jury found that

they were false.

The jury also found that their verdict

was privileged.

On the question of privilege, only informa-

tion which had been communicated to defendant at

the time of the publication is relevant.

It is appellant's contention that such evi-

dence in this case is insufficient to support the

verdict of privilege and the judgment based thereon.

RELEVANCE OF EVIDENCE

Appellant contends the following points in

the record are prejudicial in this case:

1

The evidence is not sufficient to support

the verdict that the published libel was

privileged.

2

The evidence was not sufficient to support

the "discovery of evidence" verdict.

CONCLUSION

Since the facts involved are undisputed, the

only issue for the jury is whether the published libel was

they were found to be false the only thing remaining to be discussed is the issue of privilege.

Appellee relied upon the provisions of §47 of the Civil Code of California as a basis for the plea of privilege.

Stripped of words not applicable to this cause that section reads:

"§47 [Privileged publication ...: What constitutes]

"A privileged publication ... is one made -
... 2. In any ... judicial proceeding ...;
provided that an allegation or averment contained
in any pleading ... in an action for divorce,
made of or concerning a person by or against whom
no affirmative relief is prayed in such action
shall not be a privileged communication ... as to
the person making said allegation or averment with-
in the meaning of this section unless such plead-
ing be verified ... and made without malice, by
one having reasonable and probable cause for
believing the truth of such allegation ... and un-
less such allegation be material and relevant to
the issues in such action ..."

Appellant respectfully contends that the
burden of proof is on the appellee to bring her-

they were found to be the only thing common-
ing to be discussed is the issue of privilege.
Appellate relied upon the provisions of art. 1
the Civil Code of California as a basis for the
rule of privilege.

Devised of words not applicable to this
cause that section reads:
"Any testimony given in a trial
conducted by"

"A privileged communication ... is one made ...
... in any ... proceeding ...
provision that an allegation of adultery contained
in any pleading ... is an action for divorce,
and of of transmitting a letter by or against whom
an affirmative action is taken in such action
shall not be a privileged communication ... as to
the person making and alleging an adultery ...
in the hearing of this section unless such action
has been verified ... and made without malice, by
one having reasonable and probable cause for
believing the truth of such allegation ... and no
such action be material and relevant to
the issues in such action."

Appellant respectfully contends that the
burden of proof as to the applicability of this privi-

self within the protection of the above code section (47 CC) and that there is insufficient evidence to show that the allegation was "made without malice, by one having reasonable and probable cause for believing the truth of such allegation".

In re: Malice

Malice may be inferred from words libelous per se.

Davis v. Hearst, 160 Cal. 143-196

To this the following admitted facts should be added.

Appellee did not:

1. Serve appellant as required by §1019 CCP.
2. Seek or secure an order of court for substituted notice as required by §1019 CCP.
3. Attempt to prove the truth of the charge at the divorce trial.

This constituted a serious and illegal invasion of appellant's rights. It leaves as the only logical inference that the naming of appellant was for the purpose of injuring her by publicity with no serious purpose in view of seeking to substantiate the charge.

self within the protection of the above code
section 640 and that there is insufficient
evidence to show that the defendant was "guilty"
without more, by not having reasonable and
probable cause for believing the truth of such alibi
statement.

In the opinion

Justice may be inferred from such evidence

per se.

United v. Howard, 100 Cal. 143-192

To this the following answers facts should

be added.

Justice the fact:

1. Some appellant as testified by \$1000.00.

2. Cash or money in order of about 100.

substantiated matter as testified by \$1000.00.

3. Answer to power has truth of the charge.

as the former case.

It is concluded a section 640 is illegal.

Investigation of appellant's affairs. It leaves

the only logical inference that the finding of

appellant was for the purpose of shifting the

burden with the various parties in view of

section 640 substantiated the charges.

To this additional basis for the inference of malice should be added the considered wisdom of the ages that wives in general regard with hatred, jealousy and even vindictiveness the conjectural concubines of their husbands.

In the face of all this we have only the self serving declaration of appellee herself. "I bear no malice against these people, not any whatsoever".

It is an aphorism of Western Civilization that character is revealed by deeds, not words.

"By their fruits ye shall know them" has until now been considered the summit of wisdom in judging human conduct but this jury in its verdict did its mite to reverse the Sermon on the Mount and bring us a new commandment "Ye shall henceforth judge men by their words and not by their deeds".

In re: Probable Cause

On this subject the burden was on the appellee to show by a fair preponderance of the available evidence that a reasonable person actuated by no malice would be justified from the Blanche Lampert Statement (Exhibit 8) alone in

in this connection, and the influence
 of nature should be taken into consideration
 of the fact that there is general regard with
 respect, justice and even objectiveness the com-
 mercial companies of these countries.

In the case of all this we have only the
 fact of the domination of capital interests.
 "I have no battle against these people, and my
 weapon."

It is an attempt of Western Civilization
 that character is revealed by itself, not words.
 "By their fruits ye shall know them," has
 well now been considered the result of which
 in judging human conduct but this fact in its
 that did its work in nature the better we know
 Mount and living in a new commandment "Ye shall
 knoweth judge can by their words and not by
 their words."

In the English Case

On this subject the English was on the
 opposite to him by a fact representative of the
 English evidence that a constant process
 followed by an action would be justified from the
 English Law of Evidence (Article 5) also is

believing the truth of the libel.

Only evidence known by appellee at the time of publication can be considered on the issue of privilege.

Davis v. Hearst, 160 Cal. 143-196

The only evidence upon which appellee relied was the Blanche Lampert Statement, Exhibit 8.

In the reporter's transcript the following excerpt is to be found beginning on p. 306, line 7 and ending on p. 308, line 2:

"THE COURT: Received in evidence as Plaintiff's Exhibit next in order.

"THE CLERK: Exhibit No. 8, your Honor.

"THE COURT: In evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

"MR. MAYOCK: I would like to read it at this time, if your Honor please.

"Statement of Blanche Lampert.

"Saguaro Road, Route 2, Box 621,

"Scottsdale, Arizona, November 2, 1955,

11:00 o'clock a.m.

"Present: --'

Following the death of the victim.

Only evidence known by applicant at the time
of publication can be considered as the basis of
criticism.

Quint v. Hayes, 100 Cal. 101-102

The only evidence upon which applicant relied
was the Alaska Journal statement, Exhibit 8.
As the applicant's statement of the following
excerpt is to be found beginning on p. 302, line
7 and ending on p. 302, line 21
"The Journal: Based on evidence as plain-
tiff's Exhibit made in order."
"The Journal: Exhibit No. 8, your Honor."
"The Court: In evidence."

(The exhibit referred to was
received in evidence and
marked as Plaintiff's Exhibit
is No. 8.)

"MR. HAYES: I would like to read it at
this time, if your Honor please:
"Statement of Alaska Journal."
"Exhibit 8, page 2, line 21."
"Exhibit 8, Alaska Journal, November 2, 1922."

11:00 a.m. - 11:00 a.m.

"Exhibit: -"

"THE COURT: Have you finished with this witness?

"MR. MAYOCK: No, if your Honor please.

"THE COURT: Well, why read this now? Go ahead and finish with the witness.

"MR. MAYOCK: Well, I wanted to read it to her and ask her if that is all she knew about the case, and if it isn't a [p. 306, lines 7-25] fact that that was the source and the complete record of her knowledge, if your Honor please, for filing the complaint. And I don't know any way --

"THE COURT: Can't you ask her that? She has already testified on that. You have asked her and she said, as I recall, what Mrs. Lampert told her and what her lawyer told her and what the neighbors told her.

"MR. MAYOCK: That is very true, if your Honor please. But they have asked the witness these general questions, 'Well, was that substantially what was testified to in court?' and I don't think it is.

"THE COURT: Well, can't you just ask her if what Mrs. Lampert told her is in that statement? The statement is in evidence.

"MR. MAYOCK: Mrs. Gilliland --

"THE COURT: Go ahead and read it then. We are taking more time than it would probably take to read it. Go ahead.

"MR. MAYOCK: Very well. I am going to abide by your Honor's suggestion.

"THE COURT: No. I withdraw the suggestion. Go ahead and read it. We are taking more time now than it would probably take to read it.

"Q BY MR. MAYOCK: Isn't it a fact, Mrs. Gilliland, that you had no information other than the information given you by Blanche Lampert when you accused Faye Lyons and Miss [p. 307, lines 1-26] Meyers of committing adultery with your husband?

"A That's right." [p. 308, lines 1-3]

For convenience, the Blanche Lampert Statement is set forth in full below.

1 "STATEMENT OF BLANCHE LAMPERT

2
3 Saguaro Road
4 Route 2, Box 621
5 Scottsdale, Arizona
November 2, 1955
11:00 o'clock a.m.

THE COURT: Now, HAYDOCK, are you satisfied?

THE COURT: Go ahead and read it down.

are taking more time than it would probably

take to read it. In fact,

MR. HAYDOCK: Very well. I am going to submit

by your Honor's suggestion.

THE COURT: No, I withdraw the suggestion.

Go ahead and read it. We are waiting until the

last time it would probably take to read it.

BY MR. HAYDOCK: That's all, thank you.

Witnessed, that you had no objection other

than the suggestion given you by His Honor the

court when you assumed your place and when it was

time to read the papers of competing exhibits with

your hands.

"A short rest," (p. 304, lines 1-2)

For convenience, the exhibits were placed

and is set forth in full below.

STATEMENT OF EVIDENCE

Exhibit 1
Exhibit 2
Exhibit 3
Exhibit 4
Exhibit 5
Exhibit 6
Exhibit 7
Exhibit 8
Exhibit 9
Exhibit 10
Exhibit 11
Exhibit 12
Exhibit 13
Exhibit 14
Exhibit 15
Exhibit 16
Exhibit 17
Exhibit 18
Exhibit 19
Exhibit 20
Exhibit 21
Exhibit 22
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Exhibit 25
Exhibit 26
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Exhibit 89
Exhibit 90
Exhibit 91
Exhibit 92
Exhibit 93
Exhibit 94
Exhibit 95
Exhibit 96
Exhibit 97
Exhibit 98
Exhibit 99
Exhibit 100

6 PRESENT: Mrs. Blanche Lampert, Mrs. Elsinore
7 Machris Gilliland, Mr. William L.
8 Murphey, and Mrs. Velma Shanks,
9 court reporter.

EXAMINATION BY

10 MR. MURPHEY:

11 Q Let's start with your name and address.

12 A Blanche Lampert, Scottsdale, Arizona,
13 Post Office Box 766.

14 Q How long have you worked for Mr. Gilliland?

15 A We were there from the 1st of May
16 until the last of September.

17 Q Of this year?

18 A Yes, during the summer, we were caretakers
19 for the place during the summer.

20 Q On any occasion did you ever hear Mr.
21 Gilliland call Mrs. Gilliland any names?

22 A Yes, I have.

23 Q And on one or more occasions?

24 A Oh, lots of occasions, whenever he would
25 get drunk and get mad, and he drank terrifically.

26 Q And what did you hear him call her? [p. 1]

1 A Called her 'damned old bitch'. Now, I
2 don't know how to proceed, shall I start with the
3 night he blew his stack and was going to shoot

4 everybody?

5 Q About when was it?

6 A It was when you and he came out when the
7 cooling system was wrong, Mrs. Gilliland, and it
8 was so hot you were going to stay down there. In
9 fact, you did, the night I loaned you my night-
10 gown. It was either May or June, one or the
11 other.

12 Q About May or June?

13 A Yes.

14 Q All right, go ahead.

15 A Mr. and Mrs. Gilliland came up from Palm
16 Springs. They came in one car and Fujii came in
17 the other and she was supposed to stay down there
18 that night because it was so hot up here. The
19 air conditioning wasn't working, so he started
20 feuding with her and fussing with her and being
21 nasty, so she came on up here anyway.

22 Q That is to the big house?

23 A The big house, so he kept getting drunker
24 and drunker and drunker and excited, and started
25 abusing her over the phone.

26 Q What did he call her? [p. 2]

1 A He just told her she hadn't ought to live,

2 and things like that, so then she and Fujii came
3 back down there and he kept on getting drunker,
4 so there was about that much whiskey in a bottle
5 and she poured it through the sink.

6 Q Indicating about an inch?

7 A No, I would say about two drinks, not
8 more than two drinks left in the bottle. He told
9 my husband to go get some more and she told my
10 husband not to, and Ray says, 'Well, you are
11 working for me, go get it.' My husband got out
12 and left.

13 He went in the bedroom and he got a gun and
14 came out and said, 'I am going to kill myself, I
15 am going to shoot myself,' and she said, 'Go
16 ahead.'

17 MRS. GILLILAND: I said he would never do it.

18 A He went outside and you says, 'He will
19 never do it.'

20 He says, 'I will go out and see if this gun
21 works,' and he shot the thing off outside.

22 So when I said to you, I said, 'Ought we go
23 look for him?' You said, 'Oh, no, he will never
24 do it,' so he came back in. He says, 'I am going
25 to shoot you,' and he started that way with that
26 gun. He said, 'You damned old bitch you, you [p.3]

1 and I have been there, as I have seen the boys come
2 back from court and the boys are getting dressed,
3 so there was some time with me in a world
4 and she found it through the side
5 of the window and the boys
6 a lot, I was a very good friend, and
7 more than the boys were in the world. He said
8 my husband was not very good and was not
9 husband but he was very good. He said, you are
10 waiting for me to get it. My husband was not
11 and I was
12 He was in the bedroom and he was a good man
13 and he was very good. I was very good and I was
14 in the world for those years, and he was very
15 good.
16 He was very good and he was very good.
17 He was very good and he was very good.
18 He was very good and he was very good.
19 He was very good and he was very good.
20 He was very good and he was very good.
21 He was very good and he was very good.
22 He was very good and he was very good.
23 He was very good and he was very good.
24 He was very good and he was very good.
25 He was very good and he was very good.
26 He was very good and he was very good.

1 ought to die,' and I crawled under the table, I
2 was scared, the way he was swinging that gun
3 around like that, and he did threaten to shoot
4 her.

5 Q All right, any other occasions - was that
6 the only incident of the gun that you observed?

7 A Yes, of the gun, yes.

8 MRS. GILLILAND: But I never said one word,
9 I never answered him, I never said an unkind word
10 to him.

11 A You never done nothing, no.

12 MR. MURPHEY: Q Did you ever hear Mrs.
13 Gilliland say anything abusive to Mr. Gilliland?

14 A Oh, no.

15 Q Was she always nice to him?

16 A Yes, nicer than I would be if he talked
17 to me the way he talked to you.

18 Q All right. Now, how many occasions would
19 you estimate you heard Mr. Gilliland call Mrs.
20 Gilliland a 'bitch' or 'God damned bitch' or
21 anything similar to that?

22 A Just about every time he talked to her,
23 and after he talked to her he would call other
24 people and they would discuss what all they were
25 going to do. He would do that at the rate of

1 I went on the, and I climbed onto the table, I
2 was scared, I was so, he was sitting there and
3 around like that, and the situation was about
4 then.
5 Q All right, and other witnesses - was that
6 the only location of the gun that you observed?
7 A Yes, of the gun, yes.
8 Q WILLIAM: Did I never tell you that
9 I never answered him I never said an untruth word
10 to him.
11 A You never done anything, no.
12 Q WILLIAM: Did you ever hear him
13 William was anything abusive to her, William?
14 A No, no.
15 Q Was she always nice to him?
16 A Yes, other than I would be at the police.
17 To me the way he talked to you.
18 Q All right: Well, how many occasions would
19 you estimate you heard Mr. William call her
20 William a "bitch" or "God damned bitch" or
21 anything similar to that?
22 A Just about every time he talked to her,
23 and after he talked to her he would call other
24 people and they would discuss what all they were
25 going to do. He would be that at the time.

26 about every other day. [p. 4]

1 He would call her up on the telephone and
2 call her a bitch and then he would call Judge
3 Williams.

4 Q Judge Williams?

5 A Judge Williams, and they would talk over
6 the situation and try to figure out some way they
7 was going to clip her. I don't know what Judge
8 Williams said, I knew Ray's conversation.

9 Q What did he say in substance?

10 A Well, he just said he was going to get
11 her behind the eight ball where she belonged and
12 really clip her, and he would say he was going to
13 get a Mexican divorce, and then he would say,
14 'That old bitch ought to die.'

15 Q What did he call her, 'that old bitch'?

16 A Yes, always that.

17 Q 'That old bitch ought to die'?

18 A Yes, and something else, he always said,
19 he told everybody, he made it very plain to every-
20 one after they were married he never had anything
21 to do with her, never intended to have anything to
22 do with her. He said, 'How could anyone expect
23 a guy like him to have anything to do with an old

1 He would call her up on the telephone and
2 call her a bitch and then he would call Judge
3 William
4 Q Judge William
5 A Judge William, and they would talk over
6 the afternoon and try to figure out how they
7 was going to kill her. I don't know what Judge
8 William said. I know Sam's conversation.
9 Q What did he say in conversation?
10 A Well, he just said he was going to go
11 and get the right ball which she belonged to
12 and he would say he was going to
13 get a better distance, and that he would say,
14 "That old bitch ought to die."
15 Q What did he tell her, "That old bitch"?
16 A Yes, always that.
17 Q "That old bitch ought to die."
18 A Yes, and repeating it, he always said,
19 he told everybody, he says it every plain to every
20 one after they were married he never had any
21 to do with her, never talked to her anything
22 to do with her. He said, "You could make contact
23 a guy like she is have nothing to do with an old

24 woman like that.' He said he never would con-
25 summate the marriage.

26 Q Now, any other incidents that you particu-
[p. 5]

1 larly remember along that line of abuse?

2 A Well, it was just those same things all
3 the time, all the time he would call his daughter,
4 he would call Patty Karger, and he would always
5 want someone around to hear what was said or
6 have somebody listen in on that other telephone
7 in there.

8 Lots of times when he talked to her he would
9 have one of these girl friends down there, or
10 Patty Karger, whoever was there, would be listen-
11 ing in on the extension phone to see what was going
12 on.

13 Q How often would Mr. Gilliland have guests
14 at his home when Mrs. Gilliland was around, were
15 they ever there alone that you know of?

16 A Oh, sure, he had Faye Lyons from Miami
17 and -- I think he was a little scared to be alone,
18 he acted like it, always going to have somebody
19 come if there wasn't nobody there, has had lots
20 of guests there.

14 woman like that. He said he never would com-
15 mence the marriage.
16 Q Now, any other instances that you particu-
17 larly remember along that line of abuse?
18 A Well, it was just those same things all
19 the time, all the time he would call his daughter
20 he would call her, "bitch", and he would always
21 want someone around to hear what was said or
22 have somebody listen in on that other telephone
23 in there.
24 Q Look at those men he called to hear he would
25 have one of those girl friends there, or
26 Percy Rogers, whoever was there, would be listen-
27 ing in on the telephone when he was with her and
28 say,
29 Q How often would Mr. Gilliland have guests
30 at his home when Mrs. Gilliland was around, and
31 they were there when that was said?
32 A Oh, well, he had lots of guests there.
33 Q -- I think he was a little nervous to be alone
34 he acted like it always going to have somebody
35 come if there wasn't nobody there, was that
36 at those times?

21 Q What have you observed as to women being
22 there?

23 A Well, Faye Lyons.

24 Q And when was that approximately?

25 A Well, let's see - in May when we first
26 went there, I will tell you how I know it was before
[p. 6]

1 we went on our vacation and Faye was there, he
2 was keeping her at that time up at Paradise
3 Valley, because I cooked a steak dinner for them,
4 Paradise Valley Guest Ranch.

5 Q Just tell us what you observed.

6 A He got mad at Judge Blake and Phil Kent
7 and all of them, and he went and stayed all night
8 up there himself.

9 Q Up where?

10 A At paradise Valley, when Faye was there.
11 She used to come down and stay until two and
12 three o'clock in the morning. They used to sit
13 in there and drink together and we was in our
14 own bedroom out there, they were in there until
15 two or three o'clock in the morning, then they
16 went on a trip and came back.

17 Q Who went on a trip?

18 A Mr. Gilliland and Faye, I don't know
19 where they went, but anyway when they came back
20 they brought Faye's boy back with them and it
21 didn't work, and they got in a fight and Ray
22 slapped her and she throwed a glass at him, Faye
23 broke a glass on him.

24 Q After they came back with the boy did she
25 live there at the house that you know of?

26 A No, she took the boy up to Paradise Valley,
[p. 7]

1 only she was down there every day and I baby sat
2 with the boy, or one of the neighbors did.

3 Q Until what hour of the morning?

4 A Until two or three o'clock.

5 Q Was ^{BL}she intoxicated?

6 A Sure.

7 Q--Both-^{BL}of-them?

8 A--^{BL}Sure.

9 Q Any other instances?

10 A Yes, then --

11 Q Now, before we get away from here, what
12 period of time would you say approximately that
13 this woman was involved?

14 A Oh, from May until I would say June, she

10 A Mr. Ellison had been, I think, some

11 years absent, but saying when they came back

12 that he had been away, and they had been with him and it

13 didn't work, and they got in a fight and say

14 stopped her and then showed a letter to him, that

15 from a place in Italy.

16 A After they came back with the boy did she

17 live there at the house that you know of?

18 A No, she took the boy up to the "Lobby,"

19

20 only she was there every day and I don't see

21 with the boy, or any of the neighbors did.

22 Q Until what hour of the morning?

23 A Until ten or three o'clock.

24 Q Was she there?

25 A Yes.

26 Q Did she stay?

27 A Yes.

28 Q Any other questions?

29 A Yes, that's all.

30 Q Now, please say the word "yes" or "no,"

31 whether or not you would not say anything else

32 that would be helpful?

33 A No, from now until I would say that.

15 was here most of the summer. Then when she left,
16 why, he had Ann Myers, but Ann stayed right there
17 in the house.

18 Q All the time?

19 A Yes, only time she didn't stay there was
20 one time Ann and his sister and Pat Karger, he
21 moved them all up to Paradise Valley Guest Ranch.

22 Q Moved who?

23 A His sister and Patty Karger and Ann Myers,
24 but otherwise Ann Myers, I think she was there
25 about three weeks altogether.

26 Q And what time of the year was that? [p. 8]

1 A Well, it was along about July or August
2 while we was still there.

3 Then they got into a big fight and he cussed
4 her out one night, and she called me the next day
5 from Vegas and wanted to know if he was still
6 drinking and I told her no, he had quit that day.

7 He left the next morning and went up to
8 Vegas to meet her up there. I don't know what
9 happened, he didn't get there as soon as he
10 should and she called again, but he told me he
11 turned his car over on the way up there was why
12 he was delayed, I don't know.

12 was born out of the corner. Then when she felt,
13 any, he had and heard, but she stayed right there
14 in the house.
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1 A. Well, it was about about July or August
2 while he was still there.
3 Then they got into a big fight and he came
4 out out out night, and she called me the next day.
5 From there and wanted to know if he was still
6 there, and I told her no, he had left that day.
7 He had the next morning and went up to
8 where he was in there. I don't know what
9 happened, he didn't get there as soon as he
10 should and she called again, but he told me he
11 couldn't get out any way up there was why
12 he was delayed. I don't know.

13 He was so drunk all the time all this was
14 going on, the girls would fuss and feud with him
15 because ^{BL was BL} ~~they~~ were so drunk all the time.

16 Judge Blake knows about this Faye Lyons.
17 When Blakes' was staying there, they stayed there
18 three or four days, and when they were there Mr.
19 Blake would go up to Paradise Valley and get Faye
20 and bring her down and Ray would take her back.

21 Q Now, were there any other women that you
22 observed him keeping at the house?

23 A No, them two, unless you would consider
24 Patty Karger.

25 Q How many times did Patty Karger come down
26 there?

A She was there three or four times, she
[p. 9]

1 always had this Cohen, and Ray told me one time,
2 'You know she doesn't care nothing about him, he's
3 just a friend.' I don't know.

4 Q Did they occupy separate bedrooms?

5 A Yes.

6 Q Peggy Myers, too?

7 A You can't tell too much about that, we
8 had our bedroom over there, what was going on -- I

9 could tell as a housekeeper, and I have seen him
10 in her room with shorts on and her in nothing but
11 a slip.

12 Q Which one was that?

13 A Mrs. Myers. One morning Ann Myers answered
14 the phone, Ray was in there that morning with his
15 shorts on and her with a slip.

16 Q During all of the time that Mrs. Gilliland
17 was there did you ever hear her say anything
18 derogatory or abusive to him?

19 A No, I never did.

20 Q Did you ever see him throw anything in
21 the house?

22 A Oh, he threw glasses all over the house,
23 yes, ice and glasses he would at her.

24 Q Did you ever see Mrs. Gilliland throw
25 anything at him?

26 A No, the only thing I ever saw her do was
pour about that much whiskey out, around two
[p. 10]

1 drinks.

2 Q What was his reaction to the whiskey
3 incident?

4 A That is when he was going to shoot his

5 self, that is when he got his gun.

6 Q Well, is there anything else you think
7 might be of assistance?

8 A That is all I know, I am just telling the
9 truth, that is all I am doing, because you know
10 if I would ever get to court to testify, if you
11 tell the truth then you will never get tangled up,
12 and attorneys have a way of tangling people up if
13 they don't tell the truth.

14 I do know that he bought an automobile.

15 Q How do you know that he bought an automo-
16 bile?

17 A I saw the title.

18 Q All right, then you tell us about it.

19 A He bought the automobile, and he bought
20 it on down payment, he didn't pay for it, I saw
21 the title and I saw what payments were and anyway
22 Faye Lyons had it and he got mad at her and took
23 it away from her.

24 Q Was she driving it?

25 A Sure, she drove it all the time, she said
26 she was going to Vegas. When they had the fuss I
[p. 11]

1 kept the little boy the night before. I said

2 'Are you still going to Vegas?' She said, 'No, I
3 am going to Miami, he took the car away from me
4 so now I am going back home.'

5 Q What kind of car was it?

6 A Dodge. I think he bought it from Ed
7 Spears.

8 I know that he had been wanting all the time
9 he was always wanting to go into such big things,
10 and always when he would get back he would call
11 Judge Williams, he would call his daughter, he
12 would call Andy Anderson, he would call everybody
13 and then he would just stand there and just rave.

14 He called Phil Barnett and wanted Phil to
15 file for divorce right away and Phil said no.

16 Q You couldn't hear very well, could you?

17 A Sure, I was on the extension telephone,
18 he always have somebody listening in.

19 Q He had you on there?

20 A Yes, I was on the extension phone and Phil
21 says, 'You know if you do, you are going to have
22 to say your health is ruined.' He wanted alimony
23 or separate - for a while to get that money, and
24 Phil said, 'You know she's in the hospital right
25 now,' and he said, 'You'd better wait and see how
26 she's coming out of that.' [p. 12]

1 Q When was that?

2 A Oh, it was July or August, along maybe
3 first of August, I would say, when Phil come back
4 from his trip, and he said that Phil said, 'You
5 might profit by waiting.' He says, 'You know,
6 Ray, I don't want to file for divorce because,'
7 he says, 'You know what you are going to have to
8 testify to if you do, but if you really want me
9 to I will.'

10 Q Did they say anything about the grounds?

11 A Well, his health was ruined, that was the
12 main thing.

13 Q Mental cruelty?

14 A Liquor is what ruined his health.

15 Q Has he ever made any statements to you
16 not to disclose any information?

17 A Yes, he did.

18 Q What did he say along that line?

19 A He said never to tell anything. Not only
20 that, 'Well,' he says, 'You just stay by me,' and
21 he says, 'I will buy something and I will give
22 you a job,' and which I wasn't looking for a job,
23 and he says, 'I will get plenty and I will make it
24 all right with you.' Well, I din't know -- I
25 told him, I said, 'You don't owe me anything.'

26 But there is one thing I want you to know
this to begin with, when we left there we left as
[p. 13]

1 friends, there was no argument, no fuss or feuding
2 or anything.

3 Q Were you fired?

4 A Well, we only had the agreement when we
5 went there to stay until the 1st of September
6 and we stayed until the last.

7 Q And then you left?

8 A Well, we didn't have no fuss or argument
9 is what I am saying.

10 Q You have no malice toward him?

11 A No, the only malice is him talking so mean
12 to her, that is all the malice I have.

13 This all took place at 4717 North 71st Place,
14 Mr. Gilliland's address, in that house, not in
15 this house.

16 Ann Myers has traveled all over the coast
17 with Mr. Gilliland, I believe it was the first part
18 of August, she had some parcels mailed home from
19 San Francisco, and they visited Andy Anderson in
20 Fresno. He left her sitting in a hotel and she
21 got mad about it.

22 He told me Mrs. Gilliland had already given
23 him over \$500,000.00, he said he was going to
24 clip her for five million. When he got the five
25 million he would take care of all of us.

26 MR. MURPHEY: Well, I think that is about it.

[p. 14]

1 She will type it up and bring it to you. Read
2 it over carefully before you sign it and make any
3 corrections you want to make.

4

5

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6

7

8 STATE OF ARIZONA)
 SS
9 County of Maricopa)

10 BLANCHE LAMPERT, being first duly sworn,
11 upon her oath deposes and says that she has read
12 the foregoing statement and knows the contents
13 thereof and that the same is true to her knowledge.

14

15 Blanche Lampert
16 BLANCHE LAMPERT

17 Subscribed and sworn to before me this 5th
18 day of November, 1955, by Blanche Lampert.

19

20

Velma Shanks
Notary Public

21

22 My commission expires
23 May 19, 1956."

It will be noted that the Statement consists of 15 pages of 26 lines each.

Reference to appellant therein is as follows:

Page 6, line 13 to page 8, line 15 = 55 lines

Page 11, line 19 to page 12, line 4 = 12 lines

Nowhere is the subject of adultery mentioned.

The charge of adultery is a serious thing, particularly against a woman. Accusations which could ruin a reputation and even lives should not be spoken rashly on the basis of mere anger or of groundless surmise.

That the charge of adultery against appellant was false has already been judicially established by the verdict herein. We are only concerned with whether appellee acted reasonably and without malice when she made the charge.

When this case was previously before this court the same issue was before the court. In that decision the court said "The ultimate basis

for the order granting the new trial, then, would be the lack of sufficient evidence to establish good faith and lack of malice as required by Statute." Gilliland v. Lyons, 278 F.2d 56

The same situation meets us here and the same ruling by the same court is respectfully urged.

Proof of adultery can be made in two ways:

(1) by direct evidence; (2) by indirect evidence.

No direct evidence was communicated to appellee by the Blanche Lampert Statement or by any other evidence.

Proof by indirect evidence is made by proof of opportunity plus proof of the propensity of the parties to commit adultery.

This means propensity of both parties.

Propensity by one only will not suffice.

Davis v. Hearst, 160 Cal. 143-196

116 Pac. 530

Koenigstein v. Koenigstein, 53 Cal.

App. 673, 200 Pac. 730

Hartshorn v. Hartshorn, (Okla.),

67 Ok. 45, 168 Pac. 822

State v. Eggleston, (Ore.), 45 Ore.

346, 77 Pac. 738-42

Wilson v. Wilson, 124 Cal.App. 655,

The record is silent on the point of propensity on the part of the appellant. Her categorical denial of adultery is the only competent and relevant evidence in the record.

Thus there is a complete failure of proof of adultery by indirect evidence. No legal inference of adultery can therefore be drawn. The drawing of baseless and illogical inference is not reasonable and cannot satisfy the requirements of "reasonable and probable cause" imposed by the privilege statute (*supra*).

Upon the identical "lack of evidence" found by this court in this cause on the first appeal appellant asks the same ruling in this appeal.

Since the issue of truth has been disposed of and since there is not sufficient evidence to support the plea of privilege as a matter of law, the only issue for a re-trial would be the issue of damages.

The procedure of restricting issues, in a proper case, is well established by law.

The record is silent on the point of whether
 any on the part of the appellant. The appellant
 very denial of activity is the only competent and
 relevant evidence in the record.

Thus there is a complete failure of proof of
 activity by indirect evidence. No legal inference
 of activity can therefore be drawn. The drawing
 of inferences and likelihood inference is not reason-
 able and cannot satisfy the requirements of reason-
 able and probable cause" imposed by the principle
 of *Scott* (1974).

Upon the identical "lack of evidence" found by
 this court in this case on the first appeal, ap-
 peal, the same ruling in this appeal.

Now the issue of truth has been disposed of
 and that there is not sufficient evidence to
 support the plea of guilty as a matter of law,
 the only issue is a factual one and the issue
 of *Scott*.

The procedure in reviewing issues in a
 review case, as well as the review by law.

Donnatin v. Union Hardware & Metal,

38 Cal.App. 8 (at 12); 175 Pac. 26

In a proper case, such as this, restricting the issues saves the court and the parties from re-trying issues already tried and avoids burdens of time and expense to all concerned.

CONCLUSION

Since, as shown, appellee has failed to establish the basis set out in the Statute of Privilege as a matter of law, a reversal of the verdict and judgment is respectfully urged and it is further urged that in remanding the cause for a new trial the issue be restricted to the issue of damages alone.

Respectfully submitted,

WELBURN MAYOCK

W.S. MAYOCK

By WELBURN MAYOCK

Attorneys for Appellant

Johnny v. United Hardware & Metal,

38 Cal. App. 2d 152 (1958); 152 Cal. App. 2d

In a proper case, such as this, resulting in
 issues raised the court and the parties from further
 issues already cited and avoid burden of time and
 expense to all concerned.

DISCUSSION

Since an appeal, appeal has failed to
 establish the facts set out in the Statute of
 California as a matter of law, a reversal of the
 verdict and judgment is respectfully urged and it
 is further urged that in reaching the same for a
 new trial the same be restricted to the issue of
 damages alone.

Respectfully submitted,

WILLIAM HAYES
 W. H. HAYES

BY WILLIAM HAYES

Attorneys for Appellant